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No. 94-1952

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF HAYWARD, CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a suit brought by the Attorney General to enforce the Fair Housing Act, a district court has discretion to deny an award of compensatory damages to an aggrieved person who has suffered actual damages from a violation of the Act.

2. Whether standards that this Court has applied to the determination of municipal liability under 42 U.S.C. 1981 (1988 & Supp. V 1993) and 42 U.S.C. 1983 should also apply under the Fair Housing Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-20a) is reported at 36 F.3d 832. The opinion of the district court is reported at 805 F. Supp. 810.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1994. A petition for rehearing was denied on January 24, 1995 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on April 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. S. G. Borello & Sons, Inc. (Borello) is the owner and operator of the Eden Roc Mobile Home Park in Hayward, California. Until 1989, Borello operated Eden Roc as an adults-only park and had a written policy requiring all park residents to be at least 18 years of age. The 1988 amendments to the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, prohibited discrimination against families with children under 18. See 42 U.S.C. 3602(k), 3604-3606. In order to comply with that enactment, Borello terminated the park's adults-only policy. Before eliminating that policy, Borello conducted a survey and determined that the park did not qualify for an exemption as a senior citizen community pursuant to 42 U.S.C. 3607(b). Pet. App. 7a-8a; *United States* v. *City of Hayward*, 805 F. Supp. 810, 812 (N.D. Cal. 1992).

Tenants of the park filed a petition with the City's Rent Review Office to obtain a reduction in rent. They asserted that the admission of families with children to the park constituted a reduction in housing services under a local rent control ordinance. The City accepted the tenants' petition and assigned it to an arbitrator employed by the City as a hearing officer under the ordinance. The arbitrator held a hearing on the matter, spoke to the City Attorney about the potential applicability of the Fair Housing Act, and ultimately granted the tenants' petition. She ordered a permanent reduction in their rents, concluding that "the change of status of the park from adult-only to a family park" constituted a reduction in services. The arbitrator declined to address whether the park qualified for a senior housing exemption under the Fair Housing Act. Pet. App. 8a-9a;

Hayward, 805 F. Supp. at 812-813. Under the rent control ordinance, the arbitrator's decision was "final and binding upon the owner and all affected tenants." Hayward, Cal., Ordinance 89-057, § 5(e)(3) (Oct. 24, 1989) (*reproduced in* C.A. Excerpts of Record 95).

Borello sought review of the arbitrator's decision by filing a petition for a writ of mandamus in state court. The City Council voted to defend the arbitrator's decision and therefore opposed Borello's petition. The City acknowledged that it had acted "through the hearing officer appointed by its Rent Review Office" and asserted that the hearing officer had not acted "without or in excess of her jurisdiction." C.A. Excerpts of Record 168, 171. The state court denied the petition for a writ of mandamus. Pet. App. 9a; *Hayward*, 805 F. Supp. at 812.

2. The United States filed a complaint against the City alleging that application of the rent control ordinance to Borello violated the Fair Housing Act by interfering with Borello on account of its compliance with the Act.[1] See 42 U.S.C. 3617. The district court awarded summary judgment to the United States. The court held that the City violated Section 3617 when the arbitrator, acting as the City's agent, required Borello to reduce its tenants' rents because Borello had complied with a federal anti-discrimination requirement. *Hayward*, 805 F. Supp.

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[1] Contrary to petitioner's statement (Pet. 1-2, 9-13), the United States brought this suit on referral of an individual complaint from the Secretary of Housing and Urban Development pursuant to 42 U.S.C. 3614(b)(1), and not as a "pattern or practice" case pursuant to 42 U.S.C. 3614(a). The Secretary referred Borello's complaint to the Attorney General because the matter involved "the legality of [a] State or local zoning or other land use law or ordinance." 42 U.S.C. 3610(g)(2)(C).

at 813.[2] The court declined, however, to award compensatory damages to Borello for the three years during which it had received reduced rents, finding that the City's actions "were neither frivolous, malicious nor oppressive" nor based on an "improper motive." *Id.* at 816. The court based that decision on its belief that the award of both compensatory and punitive damages was discretionary. *Ibid.*

3. The court of appeals affirmed in part and reversed in part, and it remanded for a determination of actual damages. The court ruled that the City was responsible for actions of the arbitrator that violated the Fair Housing Act. It held that the arbitrator was acting as the City's agent in an administrative proceeding. Because the City delegated its "authority to interpret or enforce the City's rent control ordinance" to the arbitrator and compelled Borello to submit to arbitration, the City was liable for the arbitrator's decision. Pet. App. 16a-17a. The court of appeals also ruled that the district court erred in refusing to award Borello actual damages. It concluded from the Fair Housing Act's language, its legislative history, and this Court's precedents that compensatory damages may not be denied when actual damages have been sustained under the Act. *Id.* at 18a-20a.

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[2] Petitioner incorrectly describes the district court as holding that "senior housing" has no "extrinsic value" and cannot provide the basis for a rent adjustment (Pet. 7-8). To the contrary, the district court expressly declined to determine whether Eden Roc was a senior housing facility and indicated that "[n]othing in the record" supported such a claim. *Hayward*, 805 F. Supp. at 814.

ARGUMENT

1. Petitioner contends (Pet. 9-13) that the Fair Housing Act gives a district court discretion to deny compensatory damages to a plaintiff who has demonstrated actual damages resulting from a violation of the Act. Specifically, petitioner argues that because Section 3614(d)(1)(B) states that compensatory damages "may" be awarded, 42 U.S.C. 3614(d)(1)(B), such an award is discretionary. The court of appeals correctly rejected that argument, which is contrary to established precedent.

This Court has held that compensatory damages are required when a plaintiff sustains actual damages resulting from a violation of the Fair Housing Act. See, *e.g.*, *Curtis* v. *Loether*, 415 U.S. 189, 197 (1974) ("There is no * * * discretion * * *: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount."). The courts of appeals have consistently followed that principle. See *Woods-Drake* v. *Lundy*, 667 F.2d 1198, 1203 (5th Cir. 1982) (directing district court to "award plaintiffs an amount sufficient to compensate them for their actual losses"); *Crumble* v. *Blumthal*, 549 F.2d 462, 467 (7th Cir. 1977) (directing district court to award compensatory damages to which plaintiff was entitled); see also *United States* v. *Balistrieri*, 981 F.2d 916, 927-928 (7th Cir. 1992) (stating that the term "damages" in 42 U.S.C. 3614(d)(1)(B) has "commonly understood meaning" and noting that government's action pursuant to that Section is "essentially a tort action for damages"), cert. denied, 114 S. Ct. 58 (1993). Cf. *Smith* v. *Wade*, 461 U.S. 30, 52 (1983) (compensatory damage award for proven losses is "mandatory" pursuant to 42 U.S.C. 1983).

The relevant statutory language, which provides that a court "may award [in addition to injunctive relief] such other relief as the court deems appropriate, including monetary damages to persons aggrieved," 42 U.S.C. 3614(d)(1)(B), does not dictate a contrary conclusion. In *Curtis*, this Court construed a similar provision of the Fair Housing Act then applicable to private suits and concluded that, despite the statute's use of the language "may award," an award of actual damages was not discretionary. See 415 U.S. at 196-197.[3] The court of appeals properly applied the reasoning of *Curtis* to this case and correctly concluded that, once the district court found that the City's application of its rent control ordinance violated the Fair Housing Act, it was obliged to award relief that would compensate Borello for the losses it had suffered.

Contrary to petitioner's claim (Pet. 12), the legislative history of the Act does not suggest that the award of actual damages is discretionary. As the court of appeals noted (Pet. App. 19a-20a), when Congress amended the Fair Housing Act in 1988 and expanded the Attorney General's enforcement authority under Section 3614, it stated that damages are available to the same extent under Section 3614 as they had previously been in a private action. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 17, 40 (1988).[4]

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[3] The current provision regulating private enforcement actions, 42 U.S.C. 3613(c)(1), continues to state that a court "may award to the plaintiff actual and punitive damages."

[4] Prior to the 1988 amendments, the Act did not specifically provide that monetary damages were available in an action brought by the Attorney General, and at least one court had held that only equitable remedies were available. See *United*

Indeed, the denial of compensatory damages in an action filed by the Attorney General on behalf of an aggrieved individual would undermine Congress's stated goal of avoiding duplicative litigation. *Id.* at 40. See Pet. App. 19a-20a.

Petitioner appears to suggest (Pet. 12) that Congress intended the courts to employ a different standard for awarding compensatory damages when the defendant is a governmental entity. That argument is without merit. Congress has given no indication of such a distinction anywhere in the language or the legislative history of the statute, and petitioner provides no authority for drawing it. Petitioner did not argue for such a distinction in the courts below, but rather asserted that the award of compensatory damages was left to the district court's discretion in all cases brought under Section 3614.

2. Petitioner additionally contends (Pet. 12-17) that an award of compensatory damages in this case would be inconsistent with this Court's decisions holding that the doctrine of respondeat superior does not apply under two other civil rights statutes, 42 U.S.C. 1981 (1988 & Supp. V 1993), 42 U.S.C. 1983. See, *e.g.*, *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735-736 (1989) (damages under Section 1981 are limited to those available under Section 1983); *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 691 (1978) (in Section 1983 action, municipality cannot be held liable under theory of respondeat superior solely for employing a tortfeasor). Petitioner's novel theory was neither raised by petitioner in the courts below nor considered by them in the proceedings below. It

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States v. *Rent-A-Homes Systems of Illinois, Inc.*, 602 F.2d 795 (7th Cir. 1979).

therefore does not warrant this Court's review. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[5]

Petitioner's argument is also without merit. This Court's holding that the doctrine of respondeat superior is unavailable in actions brought under Sections 1981 and 1983 was based on the specific language and history of those statutes. See *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 122 (1988) (opinion of O'Connor, J.). Courts, however, have "routinely applied" the doctrine of respondeat superior in Fair Housing Act cases. See *City of Chicago* v. *Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1096 (7th Cir. 1992), cert. denied, 113 S. Ct. 2961 (1993); see also *Bonner* v. *Lewis*, 857 F.2d 559, 566 (9th Cir. 1988) (respondeat superior applies under Rehabilitation Act, as it does under most civil rights statutes other than Section 1983).

The issue of municipal liability based on the actions of a municipal employee has arisen infrequently in

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[5] Petitioner argued below with respect to liability that (1) the arbitrator's decision did not violate the Fair Housing Act, because senior housing has value, and because the decision did not constitute unlawful interference with Borello, see Pet. App. 10a-16a; and (2) the City was not liable in any event for the arbitrator's decision, because the arbitrator was not the City's agent, but rather an independent, neutral adjudicator, and because the City was entitled to arbitral immunity for the arbitrator's acts, see *id.* at 16a-17a. In making the second argument, petitioner did not refer to municipal liability under Sections 1981 and 1983 or to any of this Court's decisions interpreting those statutes. Nor did petitioner challenge the applicability of the doctrine of respondeat superior to municipalities under the Fair Housing Act; rather, petitioner argued that in this case the person responsible for the discriminatory act was not acting as its agent.

Fair Housing Act cases. Indeed, to our knowledge, no court of appeals has considered the potential applicability of the *Monell* line of cases to suits brought under the Fair Housing Act.[6]

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[6] Even if judged under the *Monell* line of cases, petitioner's argument would be incorrect, because the City's position in this case constituted an official policy. The City's rent control ordinance delegated final decisionmaking authority to the arbitrator. The City permitted no appeal from the arbitrator's decision, which thus "may fairly be said to represent" the final statement of City policy on this issue. *Monell*, 436 U.S. at 694; see also *Praprotnik*, 485 U.S. at 124 (whether official has final policymaking authority is question of state law); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 481 (1986) (plurality opinion) (a single decision tailored to particular situation, if made by authorized decisionmaker, may constitute official policy under *Monell*). Moreover, although the City was aware of the decision and the Fair Housing Act issues involved, it did not intervene in the arbitration process, and indeed elected (through a vote of the City's governing body) to defend the decision as correct. See *Praprotnik*, 485 U.S. at 127 (where authorized policymakers approve subordinate's decision and its basis, municipality has ratified decision).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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